PREMIUM VEGETABLE OILS BHD A

v.

ICG SYSTEMS SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR B
RAMLY ALI J
[CIVIL SUIT NO. D5-22-945-2000]
1 AUGUST 2006

CIVIL PROCEDURE: *Trial - Preliminary issues - Rules of the High Court 1980, O. 33 - Whether plaintiff a creditor under s. 304(1) Companies Act 1965 - Whether plaintiff has pecuniary claim against company - Whether plaintiff came within ambit of 'prospective creditor' - Companies Act 1965, s. 217 - Whether plaintiff has locus standi to institute action* C D

CIVIL PROCEDURE: *Locus standi - Action by creditor - Whether plaintiff a creditor under s. 304(1) Companies Act 1965 - Whether plaintiff has pecuniary claim against company - Whether plaintiff came within ambit of 'prospective creditor' - Companies Act 1965, s. 217 - Whether plaintiff has locus standi to institute action* E

This was the fourth defendant's application (*vide* encl. 39) for determination on points of law and/or facts as a preliminary issue before the trial of the present action pursuant to O. 33 Rules of the High Court 1980. The points to be determined were: (i) whether the plaintiff was a creditor under s. 304(1) of the Companies Act 1965 ('the Act'); and (ii) whether the plaintiff has *locus standi* to bring this action against the fourth defendant (one of the directors of the first defendant) pursuant to s. 304(1) of the same Act. The plaintiff, in instituting the said action, alleged that it was a creditor of the first defendant ostensibly on the basis that the first defendant was liable to the plaintiff for breach of contract. The fourth defendant contended that the plaintiff did not qualify to be a creditor of the first defendant and that the plaintiff's claim against the fourth defendant was misconceived. The fourth defendant also argued that the plaintiff should have filed a 'proof of debt' since the first defendant was under liquidation (voluntary liquidation). F G H I

Held (plaintiff has *locus standi* to institute present action):

(1) The word' creditor' in s. 304 should be interpreted in the widest sense and that it included all persons having pecuniary claims against the company (in this respect, the first defendant) and the creditor should be a person who could enforce its claim against the company by an action of debt and need not establish a finding of liability before becoming a creditor. (para 17)

(2) Section 217 of the Companies Act 1965 provides that a 'creditor' includes a 'contingent or prospective creditor'. The word 'prospective creditor' refers to a creditor whose claim for debt or right to enforce such claim is expected or likely to happen in the future. The plaintiff herein came within the ambit of 'prospective creditor' for it to commence the present action against all the defendants. (para 19)

(3) A plaintiff who has a pecuniary claim against the company is a 'prospective creditor' to the company and by virtue of the definition in s. 217 of the Companies Act 1965, is also a 'creditor' for the purpose of winding up process of the company including for the purpose of s. 304 of the Act. Being a creditor (or prospective creditor), the plaintiff had the necessary *locus standi* to institute an action against the fourth defendant under s. 304(1) of the Companies Act 1965. (para 23)

(4) The first defendant went into voluntary liquidation on 7 May 1999. The second, third and fourth defendants (directors of the first defendant) had failed to summons a meeting of the creditors of the first defendant as required under s. 260 of the Companies Act 1965. No notice was given by the directors to the plaintiff as creditor. It was thus justifiable that the plaintiff could not have exercised its right as a creditor to file a 'proof of debt'. (para 25)

(5) There was nothing to stop the plaintiff from instituting an action under s. 304(1) of the Companies Act 1965 against the first defendant as well as all the said directors if there was a reasonable cause of action to show that the business of the first defendant had been carried on with intent to defraud creditors by any person. Under that section, the court may

declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible for all or any of the debts or other liabilities of the company. (para 25)

[Order accordingly.]

Case(s) referred to:

Emporium Jaya (Bentong) Sdn Bhd (In liquidation) v. Emporium Jaya (Jerantut) Sdn Bhd [2002] 3 CLJ 10 HC ***(refd)***

Ganda Holdings Bhd v. Pamaron Holdings Sdn Bhd [1989] 1 MSCLC 90.286 ***(refd)***

Krishnan Rajan v. Bank Negara Malaysia & Ors [2003] 1 CLJ 388 HC ***(refd)***

Kumarasamy Sengainy & Ors v. Revathy Development (M) Sdn Bhd [1995] 2 MLJ 586 ***(refd)***

Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu [2003] 4 CLJ 337 CA ***(refd)***

Tan Ching Choong & Ors v. Ekabina Sdn Bhd [2002] 3 CLJ 61 HC ***(refd)***

Legislation referred to

Companies Act 1965, ss. 217(1)(b), 260, 304(1)

Rules of High Court 1980, O. 18 r. 19(1)(a), O. 33 r. 2

Other source(s) referred:

Halsbury Laws of England, para 1530

For the plaintiff - T Kuhan; M/s Badri Kuhan Yeoh & Ghandi

For the 4th defendant - Janice Yap; M/s Chooi & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Ramly Ali J:

[1] These grounds of judgment are in respect of the 4th defendant's application (*vide* encl. 39) for determination on points of law and/or facts as a preliminary issue before the trial of the present action pursuant to O. 33 of the Rules of High Court 1980.

[2] The points to be determined by this court (as preliminary issues before trial) are:

A (i) whether the plaintiff is a creditor under s. 304(1) of the Companies Act 1965; and

(ii) If the answer to the above is in the negative, whether the plaintiff has *locus standi* to bring this action against the 4th
B defendant pursuant to s. 304(1) of the same Act.

Factual Backgrounds

[3] The plaintiff, in the present action, is seeking a declaration under s. 304(1) of the Companies Act 1965:

C

(a) that the 2nd, 3rd and 4th defendants conducted the business of the 1st defendant with intent to commit fraud on the plaintiff who was a creditor of the 1st defendant;

D (b) that the 2nd, 3rd and 4th defendants as directors of the 1st defendants with knowledge conducted the business of the 1st defendant to commit fraud on the plaintiff who was a creditor of the 1st defendant; and

E (c) that the 2nd, 3rd and 4th defendants are personal liable jointly and severally to the plaintiff for the sum of RM2,939,687.25.

The plaintiff is claiming RM2,933,687.25 and interest and costs against all the defendants.

F

[4] The chronology of events leading up to the present action by the plaintiff against all the defendants are as follows:

(i) On 11 March 1996, the plaintiff and the 1st defendant entered into an agreement whereby the 1st defendant is to
G prepare and supply application software for Contract Management for Sale and Purchase and for Managing Foreign Exchange/Spread Accounting Contracts. The contract sum is RM144,000 (the 1st agreement);

H (ii) On 29 April 1998, the 2nd agreement was entered into between the plaintiff and the 1st defendant for Rapid Application Planning and Prototyping (RAPP) System for a total of 8 modules for a contract sum of RM650,000 ie, 3 initial modules at RM250,000 and the remaining 5 modules
I option to purchase at RM400,000 (the 2nd agreement);

(iii) On 28 May 1998 the 3rd agreement was entered into between the plaintiff and the 1st defendant in respect of Integrating Software where the defendant is to maintain the system for five years from the date of installation involving a total cost of RM250,000;

(iv) Amount paid by the plaintiff to the 1st defendant between 25 July 1996 to 27 January 1999 is RM333,687.25;

(v) On 7 May 1999, the 1st defendant went into voluntary liquidation;

(vi) On 22 May 2000, the present action was filed by the plaintiff against all the defendants.

[5] The plaintiff alleges that the 1st defendant has breached all the agreements as follows:

(i) The 1st defendant has failed to complete the Contract Management System in the time period allowed, ie, four weeks;

(ii) The 1st defendant has failed to complete the System for Managing Foreign Exchange and Spread Accounting and Management Information System for Sales and Purchases;

(iii) The 1st defendant has failed to complete works under RAPP Agreement;

(iv) The 1st defendant has failed to complete the System Integration;

(v) Eventhough the Agreement between the plaintiff and the 1st defendant was not completed the 1st defendant went into voluntary liquidation on 7 May 1999;

(vi) The 1st defendant has not todate forwarded software source codes to the plaintiff; and

(vii) The 1st defendant has failed to maintain the system for a five years period from the date of installation (installation has not been completed).

[6] The plaintiff, in instituting this action alleges that it is a creditor of the 1st defendant, ostensibly on the basis that the 1st defendant is liable to the plaintiff for breach of contract.

[7] The 4th defendant disputes that the plaintiff is a creditor of the 1st defendant. Nor can it qualify even as a "contingent creditor". The 4th defendant contends that the plaintiff does not have the *locus standi* to institute the present action under s. 304(1) of the Companies Act 1965 and that the plaintiff's claim against the 4th defendant is misconceived.

[8] Initially, the 4th defendant applied by way of summons in chambers dated 15 February 2001 (encl. 14) to strike out the writ and statement of claim pursuant to O. 18 r. 19(1)(a) of the Rules of High Court 1980. The said application was dismissed by the learned SAR and upon appeal to judge in chambers, the decision of the learned SAR was affirmed and the appeal was dismissed. The 4th defendant then appealed to the Court of Appeal.

[9] *Vide* encl. 39, the 4th defendant is making application under O. 33 of the Rules of High Court 1980. The relevant provisions is O. 33 r. 2 which reads as follows:

> The Court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated.

[10] The court is empowered under O. 33 r. 2 to order a trial of a preliminary issue if:

(i) the trial of such preliminary issue will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go to trial as a whole, (see: *Petroleum Nasional Bhd. v. Kerajaan Negeri Terengganu* [2003] 4 CLJ 337; and *Kumarasamy a/l Sengainy & Ors. v. Revathy Development (M) Sdn. Bhd.* [1995] 2 MLJ 586);

(ii) there is no substantial disputes of facts (see: *Krishnan Rajan v. Bank Negara Malaysia & Ors.* [2003] 1 CLJ 388);

(iii) the outcome of the preliminary issue or question would result or substantially result in disposal of the whole case, (see: *Krishnan Rajan v. Bank Negara Malaysia (supra)*.

[11] In the present application, the preliminary issues framed for determination (*vide* encl. 39) by the 4th defendant deal with the plaintiff's *locus standi* to institute the present action under s. 304(1) of the Companies Act 1965. It has been held in *Tan Ching Choong & Ors. v. Ekabina Sdn. Bhd.* [2002] 3 CLJ 61 that an issue pertaining to a plaintiff's *locus standi* to institute an action is suitable for decision as a preliminary point pursuant to O. 33 r. 2 of the Rules of High Court 1980. If the preliminary issue of the plaintiff's *locus standi* is determined in favour of the 4th defendant the action against the 4th defendant would be dismissed. Therefore, the court is satisfied that the preliminary issues framed by the 4th defendant in encl. 39 are suitable to be determined before the trial of the whole action pursuant to O. 33 r. 2.

[12] In supporting his application under O. 33 r. 2, the 4th defendant is relying on the following undisputed facts, namely:

(a) The 1st defendant's liability for the purported breach of contract has neither been determined nor adjudicated upon;

(b) It is in fact by this very action that the plaintiff seeks determination of the 1st defendant's alleged liability for breach of contract;

(c) Such liability has been disputed by the 1st defendant;

(d) The alleged losses and/or damages purportedly suffered by the plaintiff as a result of the alleged breach of contract (which is in any event denied) have yet to be proved by the plaintiff and ascertained by the court;

(e) No proof of debt was lodged by the plaintiff with the liquidators of the 1st defendant in respect of the purported breach of contract by the 1st defendant; and

(f) Subsequent thereto, the 1st defendant was dissolved.

[13] Based on those undisputed fact; the 4th defendant submits that the plaintiff is not a creditor of the 1st defendant at the material time and therefore has no *locus standi* to institute the present application under s. 304(1) of the Companies Act 1965 against the 4th defendant.

1st Preliminary Issue: Whether The Plaintiff Is A Creditor Of The 1st Defendant Within The Meaning Of s. 304(1) Of The Companies Act 1965

[14] There is no dispute between the plaintiff and the defendants that a number of contracts have been executed by the plaintiff and the 1st defendant. The issues are regarding the contents of the contracts, the responsibilities of the parties and whether the 1st defendant has completed its agreed responsibilities. The issue between the 4th defendant and the plaintiff is regarding s. 304 of the Companies Act 1965 and the claim that the 4th defendant being one of the directors of the 1st defendant, is responsible with the other defendants for the fraud committed against the plaintiff.

[15] The 4th defendant's contention is that s. 304 of the Companies Act 1965 states that only a liquidator, creditor or a contributory of the 1st defendant can seek a relief under the said section and the plaintiff is not a liquidator, creditor or contributory of the 1st defendant as the plaintiff has to first establish as a creditor by finding of liability and therefore has no *locus standi* to bring the present action.

[16] Section 304(1) of the Companies Act 1965 provides:

> (1) If in the course of the winding up of a company or in any proceedings against a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose the Court on the application of the liquidator or any creditor or contributory of the company may if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs.

[17] The court is of the view that the word "creditor" as being used in s. 304 should be interpreted in the widest sense and that it includes all persons having pecuniary claims against the company, (in this respect the 1st defendant) and the creditor should be a person who could enforce its claim against the company by an action of debt and need not establish a finding of liability before becoming a creditor.

[18] In *Emporium Jaya (Bentong) Sdn. Bhd. (In liquidation) v. Emporium Jaya (Jerantut) Sdn. Bhd.* [2002] 3 CLJ 10, the court held at p. 193: A

> The word "creditor" is not defined in detail under the Act. Section 217(1)(b) of the Act only mentions any creditor, including a contingent or prospective creditor, of the company. In the popular meaning of the word, 'creditor is a person or company to whom money is owing. Zakaria Yatim J in *Jurupakat*'s case has said that a 'creditor is a person who could enforce his claim against the company by an action of debt'. The claim or debt in question must not be in the form of unliquidated damages (see: *Penington's Company Law* (1985) 5th Edition, page 843). When we talk about "contingent creditor", it simply means that a person who could enforce his claim by an action of debt whether the claim or the right to enforce such claim can be anticipated to arise if a particular event occurs. The words "prospective creditor" refer to a creditor whose claim for debt or right to enforce such claim is expected or likely to happen in the future. B C D

[19] Section 217 of the Companies Act 1965 provides that a "creditor" includes a "contingent or prospective creditor". The word "prospective creditor" refers to a creditor whose claim for debt or right to enforce such claim is expected or likely to happen in the future. That being the case, the court is of the view that the plaintiff comes within the ambit of "prospective creditor" for it to commence the present action against all the defendants. The issues whether the plaintiff succeeds or not at the end of the case is immaterial at the commencement stage. E F

[20] On the general rule of construction of statutes, that the same term or expression used in different part of a statute must be accorded the same meaning unless the context otherwise requires. Therefore the terms "creditor" in s. 304 must be taken to also mean to include "contingent or prospective creditor" as being used in s. 217(1)(b) of the same Companies Act 1965. G

[21] The above finding is supported by *Halsbury Laws of England*, para 1530 – where the term "creditor" is defined as "every person having a pecuniary claim against the company, where actual or contingent." H

[22] In *Ganda Holdings Bhd. v. Pamaron Holdings Sdn. Bhd.* [1989] 1 MSCLC 90.286, the court has also held: I

A ... by reason of the buyer's default in performance of the agreement, the order was converted into a money judgment. The fact that the seller was entitled to damages from the buyer had changed the status of the seller to that of a creditor.

B **[23]** The above authorities clearly say that a plaintiff who has a pecuniary claim against the company is a "prospective creditor" to the company and by virtue of the definition in s. 217 of the Companies Act 1965, is also a "creditor" for the purpose of winding-up process of the company including for the purpose of s. 304 of the Act. Being a creditor (or prospective creditor) the C plaintiff has the necessary *locus standi* to institute an action against the 4th defendant under s. 304(1) of the Companies Act 1965.

[24] The 4th defendant argues that the plaintiff (who claimed to be a creditor to the 1st defendant) should have filed a "proof of D debt" since the 1st defendant is now under liquidation (voluntary liquidation).

[25] In the present case, the 1st defendant went into voluntary liquidation on 7 May 1999. The 2nd - 4th defendants (who were E directors of the 1st defendant at the material times) have failed to summon a meeting of the creditors of the 1st defendant as required under s. 260 of the Companies Act 1965. No notice was given by the directors to the plaintiff as creditor. All the requirements under s. 260 with regard to position of creditors F were not complied with by the directors. Such being the case, it is justifiable that the plaintiff could not have exercised its right as a creditor to file a "proof of debt". In any event, there is nothing to stop the plaintiff from instituting an action under s. 304(1) of the Companies Act 1965, against the 1st defendant as well as all G the directors (2nd - 4th defendant) if there is a reasonable cause of action to show that the business of the 1st defendant has been carried on with intent to defraud creditors by any person. Under that section, the court may declare that any person who was knowingly a party to the carrying on of the business in that H manner shall be personally responsible for all or any of the debts or other liabilities of the company.

I

2nd Preliminary Issue: If The Answer To The 1st Preliminary Issue Is In The Negative, Whether The Plaintiff Has *Locus Standi* To Bring This Action Against The 4th Defendant Pursuant To s. 304(1) Of The Companies Act 1965

[26] Since the answer to the 1st preliminary issue is in the affirmative, the plaintiff would therefore has the necessary *locus standi* to bring the present action against the 4th defendant pursuant to s. 304(1) of the Companies Act 1965 and it will be superfluous to traverse the ground regarding whether the plaintiff has the *locus standi* in this application.

Conclusion

[27] Based on the above considerations, the court holds that the plaintiff in the present action is a creditor (or prospective creditor) to the 1st defendant and therefore has the necessary *locus standi* to institute the present action against the 4th defendant pursuant to s. 304(1) of the Companies Act 1965. The 2nd issues need not be answered. The 4th defendant is to pay cost of the application to the plaintiff.